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No. 96-1898

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Supreme Court of the United States

October Term, 1996

MASSACHUSETTS SCHOOL OF LAW AT ANDOVER, INC.
Petitioner,

V.

AMERICAN BAR ASSOCIATION, ET. AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

The Massachusetts School of Law ("MSL") submits this Supplemental Brief under Rule 15.8 to describe the recent decision of the D.C. Circuit in the related case of *United States v. American Bar Association and Massachusetts School of Law*, No. 96-5247, decided July 15, 1997, 1997 WL 391603 ("the government's case").[1] That decision, approving the government's consent decree against the ABA while leaving major competitive issues unresolved, enhances the need for a grant of certiorari here.

THE RELATED CASE

In the government's case the Department of Justice ("DOJ") filed a complaint against the ABA making almost all of the same allegations made by MSL. Simultaneously, DOJ filed a consent decree agreed to by the ABA. The impact of the consent decree is limited to future conduct, and it resolves only a limited range of competitive issues. By contrast, the present case seeks both damages for injury caused by past conduct and appropriate equitable relief regarding a broader range of future conduct.

MSL sought to participate in the government's antitrust suit (and obtained amicus status) because it was concerned that the consent decree did not cure a number of the most important restraints of trade charged in the government's complaint. Under the consent decree, MSL would continue to be denied accreditation (by the same actors),[2] even though

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[1] The slip opinion ("slip op.") in the government's case is appended hereto.

[2] Subsequent to the consent decree, the accreditors rejected MSL's efforts to reach a settlement. As a result of a meeting requested by MSL, it became clear that the case could not be resolved on any terms that did

the government, in its brief in the D.C. Circuit (at p.4), described accreditation as "critical to the successful operation of a law school."

After the district court entered the consent decree, MSL sought leave to intervene for purposes of appeal. The district court denied MSL's motion. MSL then contended before the court of appeals that it should have been permitted to intervene for purposes of appeal and that the consent decree was inadequate because in crucial respects it failed to restore competitive conditions.

DOJ acknowledged in its brief before the D.C. Circuit (*id.* at 5) that its "extensive investigation" had uncovered a wide range of anticompetitive practices by the ABA accrediting bodies. DOJ stressed the "critical" importance of these restraints of trade, given the fact that "[i]n over 40 states, bar admission rules make graduation from an ABA-approved law school a prerequisite for taking the bar examination." *Id.* at 4. "The ABA's accreditation rules and process, therefore, can have a considerable influence on the behavior of law schools, including their competitive behavior in a number of markets." *Id.* In particular, "the ABA restrained competition among professional personnel at ABA-approved law schools, by fixing their compensation levels and working conditions, and by limiting competition from non-ABA approved schools." *Id.* at 5. The government also found that "the ABA allowed its accreditation process to be captured by those with a direct interest in the outcome [citation omitted]; as a result, the ABA at times acted as a guild protecting the interests of professional law school personnel, rather than as a legitimate

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not force MSL to abandon its educational mission of providing less affluent persons with an opportunity to obtain a quality legal education at an affordable tuition that is only 60 percent of the median tuition of ABA law schools in New England.

accreditation agency setting minimum standards for law school quality and thus providing valuable information to consumers." *Id.*

Given the practical need for government flexibility in settlement negotiations and the deferential standard of appellate review, the D.C. Circuit did not have occasion to consider whether the consent decree fully redressed these problems or removed entry bars to low cost, innovative institutions like MSL. Thus, although the D.C. Circuit did not doubt that MSL advanced a substantial interest in contending that "the ABA's anticompetitive practices have led to denial of accreditation and thus inflicted millions of dollars of injury" (slip op. 7, WL at *4), the court did not decide whether the decree would resolve that issue. Similarly, although the D.C. Circuit stated that "we may assume that the Department brought the suit in order to benefit students who must pay the artificially high price of tuition at accredited law schools" (slip op. 8, WL at *5), it did not consider the uncontroverted fact that the decree has failed to cure this anticompetitive problem because tuitions at ABA schools continue to rise as dramatically as before -- at a rate approximately twice the rate of inflation. Rather than decide whether the ABA's anticompetitive practices have been eliminated, the D.C. Circuit was satisfied that "the decree clearly represents a material accomplishment." Slip op. 13, WL at *8. In this connection the D.C. Circuit made the following observations:

- The court said that, pursuant to the report of a special commission, accreditation rules were changed to allow up to 20% of the faculty component of the student/faculty ratio to be made up of adjunct professors. Slip op. 14, WL at *8. The D.C. Circuit did not consider the uncontroverted fact that the special commission, under whose report the percentage of adjuncts will be *limited* to 20%, had been packed with insiders who were responsible for prior challenged anticompetive

conduct, and that the 20% limitation threatens continued inflation in law school costs and tuitions.

• The court said that the ABA now encourages schools to sponsor bar review courses. *Id.* The court acknowledged, however, that the accreditors continue to preclude schools from requiring such courses or giving them for credit (*id.*), and it did not question the uncontroverted fact that less affluent persons, especially minorities, are harmed most severely by this preclusion.

• The court said the consent decree limits the percentage of deans and faculty on the Council of the Section of Legal Education, its Accreditation Committee, site evaluation teams, and the Standards Review Committee. Slip op. 14, WL at *8. But the percentages of membership changed little under the decree, and many of the "new" members of committees were long-time cartelists who simply switched committee assignments. The court did not consider the uncontroverted fact that the accreditation process has continued to be run by the very same persons who for many years were responsible for the challenged anticompetitive practices.

THE IMPACT OF THE RELATED CASE ON THE PETITION FOR CERTIORARI

MSL's case, now before this Court, is both backward-looking and forward-looking: it seeks damages for financial injury caused by prior anticompetitive acts and it also seeks to terminate those acts in the future.

The government's consent decree is forward-looking only -- it deals only with what shall be done in the future. But after the D.C. Circuit's opinion, the government decree will not contain remedies enabling low cost, innovative schools like MSL to compete free of anticompetitive entry barriers. The

20% limitation on adjunct professors, and the preclusion of required or for-credit bar review courses, remain insuperable bars to effective competition from such schools.[3]

Because there now is no possibility of complete relief being obtained through the government's case, it has become more important than ever for relief to be available in MSL's private suit. As the D.C. Circuit stated, the Antitrust Division has numerous claims on its resources. Slip op. 9, WL at *5. To spread them among competing needs, the Division often must enter compromise decrees that do not totally restore competitive conditions, but that nevertheless cannot be described as "a mockery of judicial power," or a "sell-out," or "malfeasance." Slip op. 13, 14, WL at *8.

For these reasons, this Court repeatedly has held that a consent decree in no way precludes a private suit. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 690 (1961); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. 1, 13 (1979). As the government noted in its brief in the D.C. Circuit (*id.* at 15-17), "the terms of the proposed decree will neither bind the MSL, which will remain free to seek relief in other fora, nor establish an unfavorable rule of law." Thus, precisely because the consent decree is necessarily a limited "'step toward eliminating serious anticompetitive practices,'" "MSL is free to litigate elsewhere questions common to the two complaints."

Yet by creating sweeping antitrust immunities that directly conflict with this Court's decisions, the Third Circuit has barred MSL from private litigation that would recompense

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[3] MSL's full-time tuition in the next academic year will be $10,800. The median for ABA schools in New England will be over $18,000. It is thus readily understandable why the accreditors do not want MSL to be able to compete effectively with ABA schools.

past anticompetitive injury and prevent future anticompetitive harm. In the present case, and in the many other contexts in which its decision is applicable, the Third Circuit has confined private parties to only such relief as may be obtained in a government suit. Worse still, the Third Circuit's decision, applied to future government litigation, would bar even state and federal antitrust enforcement officials from achieving the "material accomplishment" embodied in the government's consent decree.

It is now more important than ever, both for the field of legal education and for the many other professional and industrial fields that necessarily fall within the Third Circuit's ruling, for this Court to determine whether the Third Circuit's newly-fashioned immunities can stand.

Respectfully submitted.

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